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In the Matter of the Estate of Claudius Wallich, Deceased, Fred R. Wallich V. A. C. Wallich, et al : Reply Brief of Appellant

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In the Supreme Court of the State of Utah

In the Matter of the Estate of

CLAUDIUS WALLICH, Deceased,
FRED R. WALLICH,

Petitioner and Appellant

Case No.
10569

- VS -

A. C. WALLICH, et al.,

*Cross-Petitioners
and Respondents.*

FILED

AUG 29 1966

Clerk, Supreme Court, Utah

REPLY BRIEF OF APPELLANT

Appeal from Judgment of the Third Judicial
District Court in and for Salt Lake County,
The Honorable A. H. Ellett, *Presiding*

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In the Supreme Court of the State of Utah

In the Matter of the Estate of

CLAUDIUS WALLICH, Deceased,
FRED R. WALLICH,

Petitioner and Appellant

- vs -

A. C. WALLICH, et al.,

*Cross-Petitioners
and Respondents.*

Case No.
10569

REPLY BRIEF OF APPELLANT

THE ORDER APPEALED FROM MUST BE REVERSED BECAUSE IT REQUIRES APPELLANT TO ACCOUNT, CONTRARY TO THE PROVISIONS OF THE DECREE OF DISTRIBUTION WHICH HAS BECOME FINAL.

For the purposes of this brief, Petitioner-Appellant will adopt the principal propositions advanced in Respondents' Brief and then demonstrate that the Order appealed from is erroneous in requiring appellant to account.

The propositions of respondents which appellant will treat in this brief are as follows:

1. The provisions of paragraph 8 of the Will were incorporated in the Decree of Distribution.

(Resp. Br., p. 8)

2. The Decree of Distribution created a trust of which appellant was trustee.

(Resp. Br., p. 13)

3. When the Decree of Distribution has become final, it is conclusive upon the rights and duties of the parties.

(Resp. Br., p. 24)

Even if, for the purpose of demonstrating the erroneousness of the order appealed from, all of these points of respondents be conceded, then the following is also true.

The will has now ceased to exist as the document on which the rights of the parties are based. The Will has been merged in the Decree of Distribution. All rights now existing arise from the Decree of Distribution which has now become final and it is not open to collateral attack.

The Decree of Distribution incorporated all the provisions of paragraph 8 of the Will, not just some of them. Therefore, the Decree is to be read just as if it had recited, verbatim, all of the provisions of paragraph 8 of the Will. (Resp. Rr., p. 11).

One of these provisions is, "My said nephew in the administration of the trust herein imposed upon him shall act . . . without the necessity of making any accounting of any nature to any person or party concerning the administration of his trust." (Resp. Br., p. 17)

This language is entirely free from ambiguity. And being incorporated in the decree, it is the final adjudication of the rights and duties of the parties.

It is well established that once the provisions in a Will have resulted or been incorporated in a final decree, the provisions of the decree are binding even though erroneous.

The respondents could have attacked the validity of the provisions in Wallich's Will providing for no accounting in the probate proceedings before the decree was entered but did not.

There are many cases holding that void provisions in a will that have been incorporated in a final decree of distribution are binding upon the parties. A number

of these cases are discussed in points I and III of Appellant's Opening Brief.

The case of *In re Loring's Estate*, 29 Cal. 2d 423, 175 P.2d 524 is particularly in point. The facts were that by final decree of distribution the estate had been distributed in trust for certain named beneficiaries, some of which were charitable organizations and one of which was a municipality outside the State of California. After the decree became final, the heirs sought to attack the trust on the ground that under California law a testator could not dispose of more than one-third of his property to charity and could not make a legacy to a municipality in another State. If there had been an appeal from the decree of distribution, these matters could have been considered but no appeal was prosecuted and the Court held that these provisions in the decree of distribution were final and conclusive upon the parties, even though erroneous, and could not be attacked in a subsequent proceeding.

In the Arizona case of *Shattuck v. Shattuck*, 67 Ariz. 122, 192 P. 2d 229, the provisions of the will created a trust and the will provisions were incorporated in the decree of distribution which had become final. It was conceded that the trust provisions of the will violated the rule against perpetuities. However, when the heirs tried to break the will on this ground the Court held that they were barred by the final decree of distribution even if erroneous.

See other cases discussed in Appellant's Brief, pgs. 18-23.

In the case at bar respondents are in the same position as the heirs in the cases cited. This is a subsequent proceeding in which the respondent attacks the validity of the provisions of paragraph 8 of the Will in regard to no accounting being required. But this provision has been included in a final decree and even if erroneous cannot now be attacked.

It follows that the order appealed from is erroneous in requiring appellant to file an account and should be reversed upon this ground. The order is conflicting and directly contrary to the provisions of the final decree of distribution which state that no accounting shall be required of the trustee. Even if it be held that the requirement of accounting in 75-12-19, U.C.A. 1953, cannot be waived by a will, which is by no means clear, the waiver of accounting is clearly set forth in the final decree and cannot now be disregarded.

Respondents' Brief, page 25, relies on *Wood vs. Honeyman*, 169 P. 2d 131, 166 (Ore. 1946) which holds that a provision in a declaration of trust waiving an accounting is not a bar to an equitable action by a beneficiary for an accounting. The trust there involved was a private declaration of trust which had not been made the subject of any prior court decree.

Respondents' Brief, page 23, also cites *Brooks Estate*, 30 P. 2d 1065, 83 Utah 506, wherein the administrator resigned and the court ordered him to account. The administrator filed his account and the court ordered him to turn over to his successor certain money and property. The resigned administrator appealed from this order claiming error in certain items. The case is obviously not in point. The court holds that the duties of the administrator require him to account. The case at bar involves a trust created by a decree of distribution, not an administrator and *Brooks* does not involve a waiver of accounting, as here.

Resondents' Brief, page 24, cites *Ehrngren vs. Grolund*, 19 Utah 411, 57 P. 269. This case fully supports appellant's position on this point. The decree of distribution which had become final ordered the executor to deposit a sum of money in a bank for the benefit of decedent's daughter. The executor did not comply with the decree and the daughter brought this action against the sureties on the executor's bond. The sureties tried to claim that they were not bound by the decree of distribution. The court held that the decree was conclusive and not subject to collateral attack in the absence of fraud.

This is exactly what appellant contends in the case at bar. The decree of distribution here unequivocally orders that no accounting shall be required of appellant as trustee. But the trial court in this subsequent pro-

ceeding ordered the trustee to account. This order is in direct conflict with the final decree of distribution and should be reversed on this ground.

The authorities relied upon by respondent demonstrate that respondent has not met or rebutted the principal point urged by appellant in Points I and III of Appellant's Brief. Appellant again summarizes it below for emphasis.

A provision in a will may be erroneous. For example, the will may create a trust which violates the rule against perpetuities (*Shattuck vs. Shattuck, supra*); it may leave more than one-third of the estate in trust for charitable purposes in violation of statute (*Loring's Estate, supra*) or it may provide that the trustee to whom the residue of the estate is to be distributed shall not be required to render any accounting in alleged violation of 75-12-19, U.C.A. 1953 (case at bar). Many other examples are set forth in Point I of Appellant's Brief.

In each such instance, the heirs may attack the validity of any of these will provisions during the course of the probate proceedings and the validity of such provisions can be adjudicated prior to or in the decree of distribution.

However, when the heirs fail to make any objection to such an erroneous provision and the Probate Court pro-

ceeds to incorporate it in a decree of distribution which has become final, the provisions of the decree are conclusive and cannot be attacked by the heirs in a subsequent proceeding.

Therefore, here, when the Trial Court granted the respondent's cross-petition for an order to require the appellant to account, it committed reversible error because the decree of distribution has incorporated into it the provisions of the will which direct that no accounting shall be required of appellant. The decree of distribution in this regard has become final and conclusive even though it may have been erroneous if attacked at the time of the hearing on the petition for distribution. The respondents are now barred from attacking the validity of any of the provisions of the final decree including the provision relating to the waiver of accounting.

Other subjects argued in Respondent's Brief have been fully presented in Appellant's Brief and need not be further argued at this time.

It is respectfully submitted that for the reasons herein set forth and those set forth in Appellant's Opening Brief, the judgment must be reversed.

Respectfully submitted,

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